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No. 92-1894

In The

Supreme Court of the United States

October Term, 1992

NORTH FLORIDA SHIPYARDS, INC.,

Petitioner,

v.

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

On Petition For Writ Of Certiorari To The First District Court Of Appeal Of Florida And The Florida Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent Lykes Bros. Steamship Co., Inc. ("Lykes"),[1] respectfully refers the Court to the findings of fact set forth in the trial court's final judgment for a statement of the facts pertinent to the issues raised by petitioner ("North Florida"). Appendix to Petition for Certiorari at App. C-2. North Florida did not challenge these findings on appeal.

[1] Lykes' parent corporation is Shore Management, Inc. Lykes has no subsidiaries that are not wholly owned.

North Florida's statement that it and Lykes were "in agreement that there was no negligence on the part of either of them which was the proximate cause of the accident," Petition for Certiorari at p. 4, is misleading. The trial court found that Lykes was potentially liable to plaintiffs and that North Florida created this potential liability by its selection of the berthing location where it moored the M/V Lyra. Appendix to Petition for Certiorari at App. C-8.

The trial court found no active fault on Lykes' part. Lykes did nothing more than consent to the mooring berth that North Florida assigned to the M/V Lyra, based chiefly on North Florida's advices as an experienced wharfinger in Jacksonville (Lykes is based in New Orleans).

REASONS FOR DENYING THE WRIT

Summary of the Argument

The writ of certiorari should be denied. The courts below followed controlling Supreme Court precedent in awarding Lykes indemnity from North Florida for Lykes' potential liability arising from North Florida's performance of its contractual undertaking, and implied warranty, to provide a safe, suitable berth for the M/V Lyra. This Court has held that contract-based indemnity is an appropriate remedy for breach of the warranty of workmanlike performance implied in maritime service contracts. In addition, the Court has held that this indemnity is available where, as here, the shipowner's liability to the injured plaintiff is based on negligence and not on unseaworthiness.

The writ of certiorari should also be denied because the decisions below are not in conflict with decisions of the federal courts of appeals. The cases alleged by North Florida to be in conflict are distinguishable on the law and the facts. Those cases hold only that contractual indemnity for breach of the implied warranty of workmanlike performance is unavailable in specific fact situations not presented here.

This case also does not involve a person covered by the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 *et seq.* ("the LHWCA" or "the Act"), and therefore the 1972 amendments to the LHWCA are irrelevant.

1. The Decisions Below Follow Controlling Supreme Court Precedent.

In *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), this Court held that when a stevedore orally contracts with a shipowner to perform maritime services, the stevedore impliedly warrants that the work will be performed "properly and safely." 350 U.S. at 133. The consequence of a stevedore's breach of this implied warranty of workmanlike performance is indemnity to the shipowner for liabilities found against the shipowner arising from the stevedore's breach. *Id* at 133-134.

Indemnity for breach of the implied warranty of workmanlike performance has been applied to a variety of maritime service contracts, including contracts between shipowners and wharfingers for the berthing or docking of a vessel. *See, e.g., Oglebay Norton Co. v. CSX*

Corp., 788 F.2d 361 (6th Cir. 1986), *cert. denied*, 479 U.S. 849 (1986).

Ryan and other decisions of this Court make clear that a shipowner's claim for indemnity based on a breach of the implied warranty of workmanlike performance is a claim in contract, not tort. "The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon a standard of the performance of the petitioner's stevedoring services." *Ryan*, 350 U.S. at 134; *see also Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 319, 84 S.Ct. 748, 11 L.Ed.2d 732 (1964).

North Florida suggests that the tort principle of comparative negligence is the appropriate remedy for a breach of the implied warranty of workmanlike performance in maritime service contracts. That suggestion is contrary to this Court's decisions.

The cases that North Florida cites involved maritime torts, not maritime service contracts. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) (collision); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974) (personal injury). Where the claim is in tort, a tort-based remedy such as contribution based on comparative fault is appropriate. Where, however, the claim is in contract, as is the case with a claim for breach of the implied warranty of workmanlike performance, this Court has stated that the appropriate remedy is contract-based indemnity. *See Ryan*, 350 U.S. at 133-134.

This Court has specifically cautioned against using tort principles where the implied warranty of workmanlike performance is concerned. "[W]e believe that sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, 569, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958); *see also Italia Societa*, 376 U.S. at 321.

North Florida also suggests that *Ryan* indemnity is unavailable where the shipowner did not owe a warranty of seaworthiness to the injured plaintiff. That argument contradicts this Court's controlling precedent. In *Weyerhaeuser*, the shipowner was not liable for a breach of the warranty of seaworthiness; as here, its liability was based solely on negligence. 355 U.S. at 564. This Court held that the shipowner could recover contractual indemnity for breach of the implied warranty of workmanlike performance. *Id.* at 567.

2. The Decisions Below do not Conflict with Decisions of the Federal Courts of Appeals.

The decisions alleged by North Florida as being in conflict with the decisions below can be distinguished on the law and the facts.

North Florida cites two Fifth Circuit cases, *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096 (5th Cir. 1981), and *Bosnor, S.A. de C.V. v. Tug L.A. Barrios*, 796 F.2d 776 (5th Cir. 1986). Both *Gator Marine* and *Bosnor* involved disputes over damaged or

lost cargo, not personal injury. This difference, which was critical to the Fifth Circuit's holdings, distinguishes those cases from the decisions below.

In *Bosnor*, the Fifth Circuit distinguished maritime personal injury suits (as in *Ryan*, *Weyerhaeuser*, *Italia Societa*, and this case) from maritime property claims. 796 F.2d at 785. The Fifth Circuit did not reject indemnity as a remedy for breach of the implied warranty of workmanlike performance in a personal injury suit, but instead held only that it would not expand *Ryan* indemnity to cases involving cargo damage. *Id.*

In *Gator Marine*, the Fifth Circuit held that *Ryan* indemnity was unavailable under the facts, since the shipowner's conduct was sufficient to preclude indemnity. 651 F.2d at 1100, *citing Weyerhaeuser*, 355 U.S. at 567. In the alternative the Fifth Circuit stated, as later held in *Bosnor*, that *Ryan* indemnity does not apply in cases involving property damage as opposed to personal injury. *Id.*

North Florida also cites the Eleventh Circuit's decision in *Smith & Kelly Co. v. S/S Concordia Tadj*, 718 F.2d 1022 (11th Cir. 1983). However, the facts in *Concordia Tadj* are distinguishable from the facts in this case. *Concordia Tadj* involved injury to a seaman, an employee of the shipowner seeking indemnity, who was injured at sea as a result of shipboard conditions which accumulated over a period of six months and for which the shipowner was largely responsible. Deciding that the facts in the case "differ[ed] substantially from *Ryan*," the Eleventh Circuit held that *Ryan* indemnity was unavailable under those facts. 718 F.2d at 1027. In its holding the Eleventh Circuit

did not repudiate *Ryan* indemnity, either generally or in any factual context other than the one with which it was presented. It held simply that *Ryan* indemnity was not available under the facts of the case.

In this case, unlike *Concordia Tadj*, the injured plaintiffs were not Lykes' employees. Moreover, unlike the shipowner in *Concordia Tadj*, there has been no finding of any active fault on the part of Lykes for the conditions which allegedly led to plaintiffs' injuries.

3. The LHWCA Does Not Apply.

The 1972 amendments to the LHWCA precluded *Ryan* indemnity in cases in which the injured party is covered under the Act. The amendments did not, however, preclude *Ryan* indemnity in other contexts.

In this case neither plaintiff was a person covered under the LHWCA. Therefore, the limited effect of the 1972 amendments is irrelevant here.

CONCLUSION

For the reasons stated, North Florida's petition for a writ of certiorari should be denied.

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